

A. H. JONES AND H. M. C. BROWN.

[To accompany Bill H. R. No. 727.]

MAY 18, 1860.

Mr. EDWARDS, from the Committee on Indian Affairs, made the following

REPORT.

The Committee on Indian Affairs, to whom was referred the memorial of A. H. Jones and H. M. C. Brown, having fully considered the same, submit the following report :

The memorialists ask to be repaid the sum of thirty-one hundred and forty-five dollars and eighty-three cents for that amount deducted from money due them from the government and paid to one Daniel G. Major, for services as an astronomer, and also to be indemnified for losses sustained by them as surveyors while running certain boundary lines for the government provided for in treaties between the United States and the Choctaw and Chickasaw Indians, and between the United States and the Creeks and Seminoles, under contract with the Indian department, on account of a failure on the part of the government to establish certain meridians, necessarily precedent to the running of said lines, within the time specified in said contract, and to furnish protection from the Indians in the neighborhood of the work.

In support of said claims they have established the following facts : That on the thirteenth day of October 1857, a contract in writing was made and executed between them, the memorialists, on the one part, and Charles E. Mix, acting Commissioner of Indian Affairs, in behalf of the United States, on the other part, by which the said memorialists undertook and agreed as follows :

“That they, the said Jones and Brown, in their own proper persons, with the assistance of such chainmen, axemen, flag-bearers, and other persons as may be necessary, agreeably with the laws of the United States, with such instructions as they may receive from the Commissioner of Indian Affairs, will faithfully survey and mark, in the manner hereafter described in special instructions, hereto annexed and part of this agreement, the following boundary lines, to wit: The eastern and western boundary of the tract of country described in the first article of the treaty between the United States and the Choctaw and Chickasaw Indians concluded June 22, 1855, and the western boundary of the Chickasaw district, as described in the second article of said treaty. Also the line described in the first article of the treaty

between the United States and the Creeks and Seminoles concluded August 7, 1856, as follows: 'Beginning on the Canadian river a few miles east of the ninety-seventh parallel of west longitude, where Octi-ippo, or Pond creek, empties into the same, thence due north to the north fall of the Canadian; also to complete the survey and marking in the manner aforesaid of the northern and western boundary of the Creek country, from the point on the north fork of the Canadian,' to which point it was surveyed and marked by Lieutenant J. C. Woodruff, United States topographical engineer, under instructions from the War Department, and reported on by him to Col. J. T. Abert, chief of the corps of topographical engineers, United States army, September 1, 1851, a copy of which is hereto attached; and that they, the said Jones and Brown, will complete these surveys in the manner described in said special instructions, and return the true and original field notes thereof to the office of the said Commissioner of Indian Affairs on or before the first day of March, 1859, (acts of God excepted,) on penalty of forfeiture and payment to the United States of the sum mentioned in the annexed bond if default be made on any of the herein expressed conditions. And the said Charles E. Mix, in his capacity as aforesaid, agreed as follows:

"That on the completion of the surveys above named in manner aforesaid there shall be paid to the said Jones and Brown by the Treasury Department, when the receipt of their account at the office of the Commissioner of Indian Affairs, properly sworn to and certified, as hereafter described, accompanied by correct and certified plats of the surveys for which the account is rendered, as a full compensation for the whole expense of surveying and making return thereof, eighty dollars per mile for every mile and part of a mile actually run and marked in the field, random lines and offsets not included; and for every mile and part of a mile exceeding four hundred and fifty miles the said Charles E. Mix, in his capacity aforesaid, reserves to himself the discretion of paying for such excess at such rates per mile as he may deem proper."

And it was further stipulated and agreed by said parties in and by said contract as follows:

"And it is further understood and agreed between the parties to this agreement that an astronomer shall be appointed by said Charles E. Mix, in his capacity aforesaid, and his salary, at the rate of twenty-five hundred dollars per annum, be paid by the said Charles E. Mix out of whatever moneys may be due the said Jones and Brown for the services herein agreed upon, upon conditions herein expressed; but all other expenses incidental to the performance of the duties required of him, the said astronomer, in the field to be paid by said Jones and Brown; and the said astronomer shall be held responsible to the United States for the determination of such astronomical points as may be necessary to fulfil the conditions of this agreement; said astronomer shall therefore be allowed ample time and facilities for fixing said astronomical point, viz: the 100th and 98th meridians, to his entire satisfaction, provided not more than six months be exceeded. And said astronomer shall further be considered and is hereby authorized, on the part of the United States, to act as examiner and inspector of

all surveys while in progress in the field or after completion thereof; for which service the said astronomer shall be paid an additional compensation of five hundred dollars per annum by said Charles E. Mix, in his capacity aforesaid, out of moneys of the United States appropriated for the boundaries above mentioned; and that no payment shall be made for any surveys not examined and inspected and reported to the Commissioner of Indian Affairs to be correctly run and marked, according to this agreement and said special instructions hereto annexed, as a part of this agreement as aforesaid."

That immediately on the execution of the contract they made preparation, and repaired to the country where the surveys were to be made, and commenced said surveys on the twenty-first of January, 1858, and completed them on the third of July, 1859. That they made due return of their doings to the government, and the same were accepted as satisfactory, and payment made by the government according to the interpretation of the contract by the department, and accepted by the said memorialists under protest, reserving their claims for further allowances as hereinbefore stated.

That at the time they entered into the contract the United States had a military force in the neighborhood where the work was to be performed, and the Indians were quiet and peaceful.

That soon after they commenced their surveys the troops were ordered to Utah, and the memorialists deprived of the protection of which they had been assured.

That during the progress of the work the Indians became so hostile and menacing that the work was greatly delayed and interrupted, and so much so that when they had concluded their surveys under the Choctaw and Chickasaw treaty, the country in which they were to erect their observatory, and establish the one hundredth meridian preparatory to running the lines under the treaty with the Creeks and Seminoles, was in the possession of the then excited and hostile Comanches, under the command of Buffalo Hump, and that the laboring and defensive force of their party refused on that account to proceed to that work, and left them, and they were obliged to supply a new force at increased expense and delay, and to await military escort.

That the astronomer was delayed by the same cause in fixing the one hundredth meridian at the time contemplated in the contract, and as he otherwise would have been enabled to do, so that instead of establishing it early in the fall of 1858, he did not establish it until March, 1859, and that the completion of the last-mentioned lines was thus necessarily delayed, and they were not finished until the third of July, 1859, as before stated.

The memorialists, upon these facts, urged in support of their claims that if the meridians had been fixed by the astronomer by the time stipulated in the contract, they would have been exonerated from payment of his salary beyond that time, and would also have been able to have completed the work of surveying in November, 1858, and certainly within the year from the beginning, and thus have avoided not only the payment of that part of the astronomer's salary for which they now claim to be reimbursed, but all other expenses of their force after November, and certainly after January, 1859, amount-

ing, as was shown to the committee, to about twenty-three hundred dollars per month.

The committee were, however, of the opinion that the duty of the astronomer was not only to fix the meridians, but to inspect and certify the work, and that the twenty-five hundred dollar salary mentioned in the contract was to be paid by said Jones and Brown for his services in both capacities, and while those duties should continue, and that his delay in fixing the meridians, though mainly, was not wholly occasioned by Indian difficulties, and that what was so occasioned was not to him in his separate employment, but only to him in connexion with the whole party, and they therefore do not recommend repayment to the memorialists, as a separate item of any part of the amount deducted from their pay on account of his, the astronomer's, salary.

The committee, further, are not of the opinion that the whole delay of the party after November, 1858, or after January, 1859, was occasioned by Indian difficulties, but they are unanimously of the opinion that but for those difficulties the meridians would have been fixed much more seasonably than they were, and that the whole work would certainly have been completed by the force employed within the time fixed in the contract, viz: the first of March, 1859, and they are unanimously of the opinion that four months' expense at least of the whole force, including the astronomer, was an entire loss to the memorialists, without their fault, and from causes not contemplated by them, or by the department in agreeing upon the compensation for the work, and they therefore recommend that that expense and loss, which they compute at ten thousand dollars, be allowed and paid to said memorialists in full satisfaction and discharge of all their claims aforesaid, and for this purpose report the accompanying bill.

To the Senate and House of Representatives of the United States of America in Congress assembled:

The memorial of A. H. Jones and H. M. C. Brown respectfully represents, that by the second article of the treaty between the United States and the Choctaw and Chickasaw Indians entered into the 22d of June, 1855, certain boundaries were established between the Choctaw country and the State of Arkansas, and the boundaries of the Choctaw and Chickasaw country were established, and the United States agreed to have these boundaries run and marked as soon as practicable.

By another treaty between the United States and the Creeks and Seminoles, concluded August 7, 1856, certain boundaries of the Creek and Seminole country were established, and the boundaries between the Creek and Seminole nations were also established, and the United States stipulated to have these boundaries run and marked as soon as practicable; and it was also stipulated that the councils of the Creeks and Seminoles might appoint commissioners to attend the running of

these boundaries, whose expenses were to be paid by the United States.

Both these treaties appear on their face to be entered into to settle difficulties existing between the tribes of Indians with whom they were made, viz: the first to settle difficulties between the Cherokees and Chickasaws, the second to settle the difficulties between the Creeks and Seminoles.

The first treaty was also designed to procure a home for the Wachitas and other friendly Indians, in the country of the Chickasaws.

Both treaties contain stipulations that all persons not being citizens or members of the respective tribes, within their limits, shall be considered intruders, and be kept out of the same by the Indian agent and *if necessary by the military*, with the following exceptions:

1. Individuals in the employment of the government.
2. Those peacefully travelling, temporarily sojourning, or trading under license from the proper authority of the United States.
3. Such as may be permitted by the respective tribes and the assent of the agent, to reside in the bounds of the tribe.

Each treaty contains a stipulation that the United States will protect the respective tribes of Indians from domestic strife, from hostile invasion, and from aggressions by other Indians and by white persons, "and for all injuries resulting from such invasion or aggression full indemnity is promised to the parties injured, out of the treasury of the United States, upon the same principles and according to the same rules upon which white persons are entitled to indemnity for injuries or aggressions upon them committed by Indians."

In virtue of these treaties, the United States were constrained, by all the obligations of justice and good faith, to survey these boundary lines as soon as practicable. This was necessary to insure peace among the tribes contracting with the government; to establish the boundaries between these tribes and the wild Indians, and to exclude these wild Indians from the boundaries established by these treaties. The treaties bound the United States to preserve the people lawfully within these boundaries, from the intrusions, invasions and aggressions of these wild Indians.

The United States being thus bound to perform this duty of running and marking these boundaries, made several efforts through the military department to perform this duty, and ultimately entered into a contract with your memorialists, who were experienced surveyors, to execute these surveys at a price much below the military estimates.

A copy of this contract, dated the day of 1857, is herewith exhibited, and attention to it is asked. The contract is between the Commissioner of Indian Affairs and your memorialists.

In the first clause your memorialists agree to run and mark the boundary lines required by these treaties, and a line left unfinished by Lieutenant J. C. Woodruff, *in their own proper persons*, with the assistance of such chainmen, axemen, flag-bearers, and other persons as may be necessary, and return the field notes on or before the 1st of March, 1859, (accidents of God excepted,) and they are to be paid eighty dollars per mile to the extent of four hundred and fifty miles,

and above this number of miles to be paid at the discretion of the Commissioner.

But to run part of these boundaries it was necessary to ascertain by proper astronomical observations the 98th and 100th meridians. This was also necessary to fix properly the boundary line between the State of Texas and the lands of the United States on which the civilized Indians were to be settled.

To do this, the Interior Department thought proper to appoint an astronomer of its own choice, commissioned by and responsible to the department, yet supported and supplied with all necessities by your memorialists, and to be paid while performing his astronomical duties out of the money earned by your memorialists. This astronomer was also to be inspector of surveys, and was for that duty to receive a separate compensation, to be paid out of the funds of the United States. As the duty of the astronomer in fixing the 98th and 100th meridians preceded the surveys dependent on those meridians, it was stipulated that not more than six months should be exceeded in the performance of that duty. The stipulations in reference to the astronomer, were inserted in and composed the second clause of the contract.

Your memorialists entered on the execution of this contract in good faith. They organized and put in the field a large and competent force, under their personal direction and management. From the nature of the work to be performed, their employés were all necessarily men of character and reliability, and were therefore retained at high wages.

It was expected that the work would be performed within twelve months, and your memorialists made all their arrangements to perform it within that time; and the results show that the work would have been performed in that time but for obstructions which it was the duty of the United States to remove, and which were not removed until the spring of the year 1859.

Your memorialists commenced the survey of the boundary between the State of Arkansas and the Choctaw nation on the 21st of January, 1858, and completed it on the 12th of April, 1858, in 81 days. Some delay occurred from the 98th meridian not being fixed, and your memorialists did not commence that survey until the 22d of June, 1858, and finished it the 26th of July, 1858, in 35 days. The Seminole boundary was commenced on the 7th of August, 1858, and completed on the 15th of August; time, 8 days.

From the 15th of August till the 22d of April your memorialists were unable to proceed with their surveys, but were compelled to keep up their entire corps in the field, and at great expense. They completed the surveys in 1859, in forty-nine days, thus demonstrating that if they had not been delayed the field work would have been completed by the first of October, 1858. As it was, it was not completed until the 1st of July, 1859.

The delay was caused by the hostile action of the wild Indians who roamed over the country in which the boundary lines were to be surveyed.

It is historically known that this country was purchased by the United States from France. France purchased it from Spain. Both

Spain and France had adopted a policy towards the Indians different from that of the United States. A material difference was that Spain did not place the wild Indians in treaty relations, and did not recognize their right to boundaries claimed by them, but abstained from interference with them. When, then, the United States removed the civilized Indians from the east to the west of the Mississippi river, and placed them in the country over which the wild Indians roamed and claimed jurisdiction, it was regarded by the wild Indians as an interference with their rights, and led to warfare and aggressions on the civilized Indians. Against this warfare the United States was bound to protect the friendly Indians, and the treaties under which your memorialists acted contained stipulations against the intrusions, invasions, and aggressions of these wild Indians. The very act of running the boundary lines under these treaties called these provisions into action, for it was an appropriation of this country to the civilized Indians, and an exclusion of the wild Indians from it, and therefore directly provoked their hostility.

When the contract was entered into, there were garrisons of United States soldiers at various points in the country in which these surveys were to be made, which were sufficient to give the required protection, and your memorialists felt assured that complete military protection would be given them. But soon after the contract was made, and about the time the surveys commenced, the troops were ordered from this frontier to Utah. The Comanche Indians, under the command of Buffalo Hump, immediately invaded the country in great force, and approached the vicinity of Fort Arbuckle, near the 98th meridian. They took possession of the country in which the observatory for the 100th meridian was to be fixed, and it was impossible to establish the observatory and make the necessary observations at that point without a hostile conflict with them.

Your memorialists were desirous to continue their operations, and would have attempted with their own force to establish the observatory, make the necessary observations, and continue the surveys, but were dissuaded from doing so by the friendly Indians.

In the meantime constant applications, beginning on the 6th of March, 1858, were made for military protection. This protection was not granted until the 22d day of April, 1859, for the surveys in the field.

Under the shelter of Major Van Dorn's care, at Camp Rhadzeminski, an observatory was erected late in the fall by your memorialists, and during the winter observations were made to fix the 100th meridian. But the surveying party were not able to commence the surveys until May, 1859.

Under these circumstances your memorialists were subjected to the great and unexpected expense of keeping up their force in the field, and for the protection of the astronomer, until the 1st of July, 1859, nine months longer than the work would have required if military protection had been given. The Interior Department has also required them to pay the astronomer's salary until the 3d of July, 1859—making twenty-one months' and three days' salary—being nine months and three days more than the six months stipulated in the

contract as the time which should not be exceeded, amounting to \$3,145 83. To the payment of this sum your memorialists made the most strenuous resistance in their power. They herewith submit, numbered from one to —, the correspondence between themselves, their counsel, and the Department of the Interior, with the accompanying documents; and in these exhibits they think your honorable body will find the materials to form a fair judgment of their claims, both on the point involved in that discussion, and on the right to compensation for increased cost of keeping their force in the field for more than nine months longer than would have been done if military protection had been given.

Your memorialists do not wish to re-argue the question discussed in this correspondence; they will content themselves with a brief statement of their claims, of the points decided by the Executive, and a few additional considerations to enforce the claims.

They ask relief on two points.

1st. They ask that the sum of \$3,145 83 charged to them for the astronomer, over and exceeding the period of six months, be refunded.

2d. They ask compensation for being compelled to keep up their party in full force, and for their personal attention from the 1st October, 1858, to the 1st July, 1859.

Both these claims rest on the same question, viz.: was the United States bound to afford your memorialists military protection as employés of the government, performing a duty the government was bound to perform under treaty?

Your memorialists do not think it necessary to inquire whether persons entering the Indian country on a private enterprise do so at their own risk; that question may involve the consideration of the Indian intercourse laws and the principles on which they are founded.

Your memorialists insist they were not to be classed as adventurers engaged in a private enterprise; they were employés of the government, performing on its behalf a duty it was bound by treaty to perform for the benefit, security and peace of the Indians with whom the treaties were made; they were sworn to perform this duty faithfully; they entered the country by express authority of the government to execute the surveys required by treaty, and they insist that they were under its protection; they insist that they cannot be considered as adventurers going into the Indian country in a private enterprise of which the benefit and risk were matters of private concernment; They went as government employés for the benefit of the government and its Indian wards, and the results of their labors were for the benefit of the government; and as the results were for the benefit of the government so ought the risks to be borne by the government.

If these surveys had been made by the military engineers and had been delayed by the hostilities of the wild Indians, unquestionably all the increased expenses of pay, rations, and incidental matters, would have been borne by the government as part of the risks incurred in the performance of its duty.

These memorialists cannot perceive that when the government calls civilians into its service to perform governmental and treaty duties, and compensates them by contract, that they are less employés of

the government and more subjected to hazards and risks of war than if they were in the service by military contract ; and any military man with the same force would have stopped his operations when your memorialists did, on the entreaties of the friendly Indians, because his further proceeding might have involved the peace and safety of the civilized and friendly Indians ; and while his spirit might have incited him to brave any personal difficulty, true courage obliged him to respect the safety and peace of the friendly Indians.

The delay caused by hostility of the wild Indians was a delay which must have brought its consequent damages and costs on the United States, whether the surveys were to be executed by the civil or military department ; against such delays the United States had expressly stipulated in the articles of the treaties which guaranteed the removal by military force of intruders, and protection from hostile invasion and aggressions of other Indians. Your memorialists cannot doubt that being employed in the actual execution of this treaty they had the right to the guarantees of peace and security given in the treaty. They believe that whenever the government employs its citizens to perform government duty within its acknowledged jurisdiction over Indian territory, it impliedly guarantees to them such security against Indian hostilities as will enable them to perform the required duties ; this results from the character of the parties ; the government is sovereign in its relation to the Indian tribes ; it has the power of peace, and where treaties exist a control over the persons permitted to enter the Indian territory, and in this case it was by treaties under special obligations to remove intruders from the territory by military force, and to defend the country from all hostile invasion of other tribes or nations of Indians ; they have also agreed to indemnify from the treasury of the United States all parties suffering from the hostile acts of intruders.

Your memorialists submit, this invasion was of the character against which the United States stipulated to protect this territory, and these wild Indians were intruders who were to be removed by military force. When your memorialists undertook, as employés of the United States, to run and mark the lines required by these treaties, they were executing the treaty, and were entitled to the benefit of the guarantees against the invasions and hostile aggressions of the wild Indians ; the government was bound to prevent these hostilities, and the confidence that this duty would be performed was the basis of the contract ; the United States could never have designed to delegate to your memorialists the power and duty to make war with these tribes ; such a stipulation inserted in the contract would have been derogatory to the character of the United States, unconstitutional and void ; so the insertion of a clause saving any delays from the hostilities of these Indians would have been derogatory to the government, for it would have contained a reflection on its intention to discharge its proper duties.

But, if this should not have been done, the failure to insert such a clause ought not by implication to create a ——— of your memorialists to suffer loss from the failure or refusal of the government to perform its duty. As one of the parties was clothed with all the powers to preserve the peace necessary to the execution of this contract,

and could not delegate those powers to the other party, it was to execute them itself or bear the loss incurred by a failure to do so.

But this is not all. When the contract was undertaken there was in this territory a sufficient military force to insure full protection to your memorialists; this force was removed to Utah. Your memorialists do not presume to sit in judgment on the executive of the United States, or to question the propriety of its dispositions of the military forces of the United States, but they respectfully, yet urgently insist, that by this action of government their position was changed; that they were thereby exposed to a hazard which did not exist when they undertook the contract, and ought to be indemnified for the injuries sustained.

They also rely on the express stipulations of this contract. By its express stipulations not more than six months were to be exceeded in fixing the two meridians. They have shown that if the second meridian had been fixed in August, 1858, they could have completed the work required in the contract by the fall of that year; but, until this meridian was fixed, none of the work consequent on it could be done.

Your memorialists insist that the United States expressly stipulated that six months should not be exceeded in fixing this meridian. On this point they understood the Interior Department to agree with them. In the letter of the Secretary of the Interior to the counsel of your memorialists, dated February 11, 1860, it is said, on the construction of the second clause of this contract, "first, as the establishment of the meridians requires astronomical knowledge, the Indian office is unwilling to intrust this duty to Jones and Brown, but stipulate that it shall be performed by an astronomer; second, to make sure that a competent astronomer shall be employed, the Indian office will select one itself;" "fifth, Jones and Brown are relieved from all responsibility for the correctness of the astronomical portion of the work; therefore they must not hurry the astronomer, but must allow him ample time to establish the meridians to his entire satisfaction; but the astronomer, being thus made independent of Jones and Brown, may consume too much time, and unnecessarily delay the work in the field; therefore, sixth, he shall not take more than six months to establish the meridians."

Your memorialists, with all respect, insist that as the United States insisted on the appointment of an astronomer of its own choice, who was to be independent of Jones and Brown, but was responsible to the United States, as they had no control over this astronomer, and therefore the United States expressly stipulated that this astronomer should not exceed six months in fixing the meridians, the United States took the consequences of the delay. It is submitted that the meridians must be fixed before the work consequent on them is done; of course nothing could be done by your memorialists in the surveys of the one hundredth meridian until after that meridian was fixed in the spring of 1859.

The delay from August, 1858, until the spring of 1859, waiting on the astronomer, does the very thing against which your memorialists were guaranteed by the stipulation that six months should not be exceeded in fixing the meridians. Your memorialists are advised that

it is immaterial whether this delay arose from waste of time by the astronomer, from defect of energy on his part, or from the failure of the United States to furnish adequate military protection. The United States had guaranteed your memorialists against this delay of their officer without reference to the cause of the delay.

Your memorialists know that the great cause of this delay was the failure of the United States to furnish military protection. In his letter, dated ———, 1859, Mr. Major, the astronomer, states that the surveyors had applied for protection and it had not been granted. He makes the application on his own account. This application shows the necessity of protection, and that the astronomer had not yet gone to the one hundredth meridian.

In his letter of December, 1858, written without the knowledge or consent of your memorialists, Mr. Major applies to the Indian office for an extension of time for making observations at the one hundredth meridian because the late period at which he had been enabled to reach this station had rendered such extension necessary. This application was granted without consulting your memorialists. By these acts the government not only permitted their officer to exceed the six months which it was stipulated he should not exceed, but when this time had, in consequence of their failure to protect this officer, been exceeded five months, a further extension of time was granted without the consent of your memorialists.

This was clearly a breach of the contract of the government, and your memorialists are entitled to be repaid all damages caused to them by this breach.

As already said, they have been compelled to pay the salary of the astronomer for the time this contract was exceeded. They have also been compelled to keep up in the field for the protection of the astronomer and the completion of the surveys their entire force at great expense.

When your memorialists undertook this work they submitted an estimate of the expenses, a copy of which is herewith shown, which made their outlay amount to \$2,750 per month for wages and subsistence of persons employed, and the outfit amount to \$7,100. The expenses of your memorialists in executing this contract shows this estimated expenditure was not too large. They are well satisfied that their expenses for the nine months' delay on this work were fully equal to this estimate.

Your memorialists have lost heavily by the delay in executing this contract. As this delay was caused by the failure of the United States to furnish the proper protection, and by its actual breach of the contract in allowing to the astronomer more than nine months more than the six months which it was stipulated he should not exceed in his operations, your memorialists ask such indemnity for their losses as may seem reasonable and just.

A. H. JONES,
H. M. C. BROWN,

United States Surveyors of Indian boundary lines.

